

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CA07-1323

September 17, 2008

ANTHONY WILLIAMS	APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, TENTH DIVISION [JN 06-417]
V.		HONORABLE JOYCE WILLIAMS WARREN, JUDGE
SHERRY WILLIAMS	APPELLEE	AFFIRMED

This case arose from a dependency-neglect case that resulted in a permanency-planning order placing permanent, legal custody of appellant's, Anthony Williams's, minor daughter, N.W., with N.W.'s maternal grandmother. Appellee, Sherry Williams, is N.W.'s biological mother, but custody of N.W. was awarded to appellee's mother. This custody decision concerning N.W. was precipitated by the allegations of sexual abuse that were made by another of appellant's daughters, C.W. There were no allegations of sexual abuse related to N.W. This is not a direct appeal from the permanency-planning order. Rather, it is an appeal from the trial court's denial of appellant's motion for reconsideration of that order. In seeking reconsideration of the custody decision, appellant contended that newly discovered evidence supported his motion. The newly discovered

evidence was his daughter C.W.'s recantation of her sexual-abuse allegations against him. Alternatively, he asked the court to change custody from the maternal grandmother to him, based upon his assertion that the recantation of the allegations against him represented a material change of circumstances, justifying the change of custody. Short of that outcome, he sought an increase in the amount of visitation that he was receiving. The trial court denied his three-pronged motion in all respects. We affirm.

In the earlier May 16, 2006 adjudication order, the trial court made the following detailed findings:

3. The Court finds, by a preponderance of the evidence, that the juveniles are dependent-neglected as defined by Arkansas law, as the juveniles are at substantial risk of serious harm, as a result of abandonment, sexual abuse, neglect, and parental unfitness to these juveniles. Such a finding is based on the Court's determination, after considering the evidence presented at this hearing, that these allegations in the petition and affidavit are true and correct. Specifically, the court finds that the father's testimony establishes abandonment, sexual abuse, neglect, and parental unfitness. The father admitted that he suspected that his daughter was having a sexual relationship with his son. The father admitted that he did nothing to prevent the sexual abuse. He did not even prevent the two from being home alone together. When the father finally caught his children in a sexual relationship, he immediately moved his son from his home. The father's ability to immediately remove his son from the home shows his ability to prevent his children from being home alone together, but the father did nothing. Next, the father's testimony establishes neglect. The father is not an inexperienced man when it comes to child rearing. He has ten children. He testified that one of his children, [L.W.], has been in and out of counseling, however, he did nothing to provide [C.W.] with counseling concerning her sexual relationship with her brother or any of her other issues. He is also a neglectful parent in his failure to protect his daughter from having a sexual relationship with her brother. Furthermore, the father's testimony establishes that he has abandoned [C.W.]. He testified before the Court that he does not want [C.W.] to come back into his home. He has not visited with [C.W.] since she was taken into DHHS custody, and, today, he told the Court that he does not want her back into his home.

In addition to the father's testimony, other testimony and evidence was presented to the Court to further the Court's findings. [C.W.] has been the victim of sexual abuse at the hands of her father. [C.W.] presented very detailed information to the Court concerning the sexual abuse that her father committed against her. In addition, Detective Marilyn Scott testified before the Court, stating that she found [C.W.] credible because of [C.W.]'s ability to recall details. Moreover, Det. Scott stated that [C.W.] never provided typical answers that Det. Scott would expect during [C.W.]'s interview, like stating that all of the sexual encounters occurred on the bed, instead, [C.W.] gave Det. Scott atypical responses. Specifically, she told Det. Scott about her father having sex with her on the floor. Furthermore, Det. Scott testified that [C.W.] stated that her father would sometimes ask [C.W.] to go "hunch." Det. Scott testified that hunching is used to describe a sexual act where there are all of the sexual motions without actual penetration. During Det. Scott's investigation, this fact became significant because, as Det. Scott testified, Anthony Williams is impotent, which makes [C.W.]'s description of hunching fit the facts of impotence. Other evidence of sexual abuse was revealed when [C.W.] testified that her father did penetrate her. Anthony Williams corroborated her testimony when he testified that he takes medicine, Cialis, for his impotency that allows him to achieve an erection. Furthermore, [C.W.]'s siblings, [L.W.] and Henry Williams, corroborated [C.W.]'s story. Both siblings testified that they witnessed their father enter [C.W.]'s room and heard noises from the rooms such as [C.W.] saying, "No," and the bed banging against the wall.

. . . .

Because Anthony Williams has sexually abused, abandoned, and neglected his children, Anthony Williams is unfit as a parent. Thus, the Court finds that these children are dependent-neglected as a result of abandonment, sexual abuse, neglect, and parental unfitness.

On April 27, 2007, appellant filed his motion for reconsideration of permanent custody of N.W. The hearing on appellant's motion was held on August 3, 2007. Appellant's counsel explained to the trial court that C.W. regretted having made the allegations against appellant, that she had not known how "to undo" what she had done, and that C.W. was present at the hearing to recant her earlier allegations of sexual abuse.

The trial court rejected appellant's offer of evidence on the recantation. The court then allowed appellant to *proffer* the following testimony, which did not play a role in the trial court's decision.

Appellant proffered his own testimony in which he continued to deny ever having had inappropriate sexual contact with C.W. He stated that he had discovered evidence that "leads me to believe" that the information given to the court by his son Henry and his daughters, L.W. and C.W., was not true. C.W. proffered her testimony that the allegations of sexual abuse that she had previously made against appellant were not true; that she had offered money to L.W. and given money to Henry to support her lies and to testify against appellant; that appellant never sexually abused her; that she concocted the story because she was mad at him; and that she was now telling the truth because she wanted forgiveness. Calina Hinds proffered her testimony that she was engaged to appellant's son, Henry, at the time of his death, and that she had personal knowledge that C.W. had offered Henry some money in exchange for testifying against appellant. Letters from C.W. were also proffered, which recanted her allegations against appellant and explained why she had made the allegations in the first place.

Following the hearing in which the trial court would not allow evidence of the recantation of the allegations of sexual abuse, appellant's motion for reconsideration was denied and an order to that effect was filed on August 3, 2007. Paragraph 3 of the August 3, 2007 order provided:

The Court denies the Defendant's Motion for Reconsideration, or in the alternative, Motion for Change of Custody, or in the alternative, Motion for Liberal Visitation. The Court notes that Mr. Williams's attorney can appeal, but the issue of sexual and physical abuse of [C.W.] and [L.W.] has been settled and that is *res judicata*. This Court will not reopen that matter. The Court found both girls credible. [N.W.] was found dependent-neglected and was also found to be at substantial risk of serious harm, and the Court will not set aside that finding. The only material change of circumstances that the Court will take up would be that the father is a treated sex offender and is now complying with sex offender treatment. The Court's previous order concerning Mr. Williams's visitation with [N.W.] remains in full force and effect.

Appellant's three points of appeal are so intertwined that they can best be discussed together. First, appellant contends that it was an abuse of discretion for the trial court to refuse to hear any evidence regarding C.W.'s recantation. Second, he contends that it was an abuse of discretion to deny his motion for change of custody and refuse to hear any evidence regarding a material change in circumstances. Third, he contends that it was clearly erroneous and an abuse of discretion for the trial court to deny his motion and to decide the issue on the basis of *res judicata*. We find no abuse of the trial court's discretion, which is considerable in these matters.

With respect to appellant's contention that the trial court abused its discretion in refusing to hear new evidence regarding the recantation, we note that in making this argument appellant relies solely upon cases discussing evidentiary relevance and Rule 401 of the Arkansas Rules of Evidence. His reliance is misplaced. The trial court did not rule that the evidence of recantation was not relevant. Rather, the trial court recounted that she had found C.W. to be credible in the prior proceedings when C.W. asserted that appellant had sexually abused her and that the court did not intend to revisit that factual

issue. She explained that she would revisit her custody decision only if appellant presented evidence of changed circumstances showing that he had been treated as a sex offender and was complying with the requirements of that treatment. It was undisputed that he had not even sought such treatment.

Our supreme court, in discussing newly discovered evidence, explained in *Lee v. Lee*, 330 Ark. 310, 312, 954 S.W.2d 231, 233 (1997):

It is settled law that a new trial based on newly discovered evidence is not a favored remedy, and whether to grant a new-trial motion on such grounds is within the sound discretion of the trial court. This court has also established that, in a hearing on a motion for new trial based on newly discovered evidence, the burden is on the movant to establish that he or she could not with reasonable diligence have discovered and produced the evidence at the time of the trial, that the evidence is not merely impeaching or cumulative, and that the testimony would have changed the result of the trial.

(Citations omitted.) The trial court was clearly satisfied with its credibility findings regarding C.W. in the earlier proceedings and saw no reason to revisit those findings based upon C.W.'s recantation. Appellant has not provided us with any authority that convinces us the trial court abused its discretion in handling the issue as it did.

Similarly, we find no abuse of the trial court's discretion in determining that appellant's assertions of recantation did not present a material change of circumstances that would justify a change of custody. As the trial court explained, and as we have previously discussed, the fact that appellant had sexually abused C.W. had already been established to the trial court's satisfaction and, having previously found credible C.W.'s testimony alleging such abuse, the trial court would only consider a change of circumstances that

demonstrated appellant had undergone treatment for sexual offenders and that he was complying with the requirements of that treatment. It is undisputed that appellant has not undergone such treatment.

With respect to the trial court's reference to the doctrine of *res judicata*, we find no error. The doctrine of *res judicata* bars the relitigation of claims that were actually litigated in the first suit as well as those that could have been litigated. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). We have long recognized, however, that the application of this doctrine in child-custody matters requires a more flexible approach. *Id.* A judgment awarding custody of a child to a parent, or any other person, is a final judgment, from which an appeal lies, "but it is not *res judicata* in the same or another court of this state involving the custody of the same child, where it is shown that the conditions under which the former decree was made have changed and that the best interest of said child demand a reconsideration of said order or decree." *Id.* at 339, 72 S.W.3d at 850 (quoting *Tucker v. Tucker*, 195 Ark. 632, 113 S.W.2d 508 (1938)). Here, it is clear from our review of the trial court's actions that it recognized the flexibility of the doctrine in child-custody matters. Confronted solely with recantation evidence, however, the trial court was simply not convinced that there had been a change of circumstances, much less one that affected N.W.'s best interests. Consequently, the trial court's reliance upon the doctrine with respect to its factual finding that appellant had sexually abused C.W. was not misplaced under the circumstances of this case.

In closing, we also note that appellant did not challenge the other bases relied upon by the trial court in placing custody with the maternal grandmother, *i.e.*, abandonment, neglect, and parental unfitness. Consequently, even if we had found an abuse of discretion associated with the proffered evidence of recantation, the other bases relied upon by the trial court would not be affected by that evidence.

Affirmed.

VAUGHT and BAKER, JJ., agree.